No. 10975

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE HAZARD,

Appellant,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation; WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBICAM, INC., a corporation; and GOODYEAR TIRE & RUBBER CO., INC., a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX.

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Appellant's Reply to Appellees' Statement of Facts.

The section in appellees' reply brief entitled "Statement of Facts" is neither entirely accurate nor is it strictly speaking a "Statement of Facts," but is rather partially a statement of facts and partially argument. The following statement appears upon page 2 of appellees' brief:

> "Two other facts are worthy of mention:
>
> First, the radio broadcast is based upon the motion picture version of appellant's dramatic work rather than upon the work itself. This fact is expressly found by the court [Finding, par. 9, Tr. p. 252] in the following language:

> '9. The radio broadcast referred to in the foregoing paragraph was a sketch of the motion picture version of plaintiff's dramatic work.'
>
> This finding is fully supported by the record . . ."

Appellant denies that the radio broadcast is based upon the motion picture version of appellant's dramatic work, rather than the work itself, and insists here that appellees' statement to the contrary is argumentative and is not a true statement of fact. It is contended here that this is one of the important issues to be determined by this appellate court.

It is true that the trial court made the finding of fact cited above, but appellant asserts here that it is not a fact, as stated by appellees, that said finding is fully supported by the record. This, again, is but an argumentative move on the part of appellees, rather than a statement of fact, and is likewise one of the important issues to be determined by this appellate court.

On page 3 of appellees' brief, the following language appears:

> "The important thing, for reasons hereinafter indicated, is that in interpreting the language of the grant or bill of sale it must be assumed to be a fact that the radio script is based upon the motion picture scenario, and that in preparing such radio script no use whatever was made of appellant's dramatic work."

It is true that the writer of the radio script, at the time that he was actually writing that script, had before him the motion picture script and not the original dramatic script. The common source, however, was the dramatic script. That is stipulated and agreed to both in the pleadings and the evidence. But it is not to be assumed, as

appellees have implied, that the radio script was not based upon appellees' original dramatic work. The radio script was in fact based upon the original dramatic work of appellant.

The last paragraph on page 3 of appellees' brief is argumentative and is not a statement of fact, excepting in a few minor, inaccurate respects. For instance, it is not a fact that the radio broadcast makes use of only a very small part of the screen play or scenario. Nor is it a fact that the radio broadcast is a mere outline or synopsis produced in dialogue from the story told by the motion picture. It is not in fact a sketch of the motion picture scenario. The only accurate statement of fact in this paragraph is as follows:

> ". . . It is set forth in full in the Transcript at pages 7 to 32, inclusive. On the other hand, the portrayal upon the screen of the motion picture scenario occupied the best part of two hours, and is to be found at pages 47 to 223, inclusive, of the Transcript . . ."

Appellant strenuously contends, however, that the following statement appearing in this paragraph is entirely inaccurate and misleading:

> ". . . The mere difference in length of the radio broadcast and the motion picture scenario establishes conclusively that the former is but a small part of the latter . . ."

Hereinafter in this brief appellant will present his arguments respecting the foregoing comments.

Appellant's Reply to Section in Appellees' Brief Entitled "Assignment of Errors."

Appellees state that in appellant's opening brief appellant has specified errors under five separate headings, but allege that there are in fact only two grounds urged upon appeal. It is admitted that in appellant's opening brief there are five separately numbered specifications of error. An examination of appellant's opening brief, however, will disclose that none of the errors specified have been abandoned upon this appeal. Appellant's reply brief, pages 8 to 22, inclusive, is devoted to the arguments directed to specifications of error numbered 1, 2, 4 and 5. Appellant's reply brief, pages 23 to 26, inclusive, is devoted to the arguments directed to specification of error number 3.

Appellees' statement that there are in fact only two grounds upon which appellant urges as a basis for reversal is misleading and inaccurate.

Appellant's Reply to Paragraph 1 of Appellees' Brief Entitled "Argument."

Appellees state on page 5 of their brief:

> "In determining whether the defendants exceeded the rights given them by the contract it must, however, be kept in mind that as found by the court, and established by the evidence, the radio broadcast is based upon the motion picture version of appellant's dramatic work rather than upon the work itself, and secondly, that a comparison of the radio broadcast with the motion picture scenario clearly shows that the former is only an outline or sketch of the latter. The language of the grant is, it seems to us, too certain and definite to leave any room for construction or interpretation."

For the reasons set forth in appellant's opening brief, as well as the reasons which will be hereafter presented to this court, it is insisted that the trial court's finding that the radio broadcast is based upon the motion picture version of appellant's dramatic work, rather than upon the work itself, is not supported by the evidence; and there is no reason why this court should assume, as appellees have done, that such a finding is supported by the evidence. Although it is conceded that if there is a conflict in the evidence, the trial court's finding of fact will not be disturbed on appeal, nevertheless in this case it is insisted that there is no conflict in evidence, or at least whatever evidence there is upon the subject conclusively points to the fact that this finding is not supported by the evidence. There is no parole evidence involved in this case. The evidence which is presented to this court on appeal consists primarily of the two manuscripts and the license agreement, whereby appellant licensed appellee Columbia Pictures Corporation to exploit his original dramatic work for certain limited purposes. Those manuscripts and that agreement are before this court and if upon those documents this court concludes that the radio broadcast here complained of violated the license passing under the agreement, then this court can and should hold that the trial court's finding last referred to is not supported by the evidence in the case, and upon that ground alone the judgment should be reversed.

Next, on page 5 of their brief, appellees, in referring to paragraph 1 of the agreement, make the statement that said paragraph 1 grants "seriatim" certain rights to Columbia Pictures and then proceed to designate each of said grants by numbers, which they have arbitrarily assigned, but which numbers do not appear in the contract itself.

Appellees assume throughout their entire brief that each of the elements of paragraph 1 of the agreement to which they have arbitrarily assigned numbers are in fact separate grants. It is appellant's position that these grants were not intended to be separate and independent of each other but that they all refer to privileges licensed under the agreement which are incidental to and only to be exercised in connection with the basic and primary right of the production, distribution, performance and exhibition of the motion picture.

Appellees' own argument, appearing at the bottom of page 6 of their brief, is as persuasively in favor of appellant's position as any argument which could possibly have been presented upon the subject. In that connection, appellees state:

> "The value of this particular right to Columbia Pictures Corporation arises not only because of the fact that a sale of this right could be had, as in this case for $750.00, but because the assignee of the right agrees *'In all advance radio announcements and immediately preceding the presentation of the broadcast of my radio adaptation of said motion picture version, I agree to announce the title of said motion picture version and the fact that it is a Columbia Picture Corporation production'.*"

In that statement lies the gist of appellant's position. From that statement, appellees obviously intended to imply that they were interested in obtaining advertising and publicity for the motion picture—so much so that before they would permit any broadcast, they insisted that the public be informed over the air that this was a radio adaptation of a motion picture by the same name, which was produced by Columbia Pictures Corporation. That, in appel-

lant's opinion, is all that the limited grant in paragraph 1 permitted, that is to say, that a sketch or a scene, or an episode, from the motion picture might be broadcast over the air, for the purpose of exploiting and advertising the motion picture itself. This is far from permitting general broadcasting of the entire play, and we again insist here that what was broadcast was not a sketch of the motion picture version, or of anything else, but was a broadcast of a complete play from beginning to end, sequence after sequence—either of the original dramatic composition or of the motion picture play—and it makes little or no difference which was used, since it was a whole play and not a sketch which was broadcast.

Appellees on page 8 of their brief challenge appellant's statement contained in his opening brief that there were three versions, not merely two. Appellees have assigned no logical reasons for their challenge in that respect. However, appellant's proposition may be stated in another manner. Without repeating the arguments contained in appellant's opening brief, it is urged that it must be patent and obvious that this was primarily a motion picture contract, not a radio contract. It is equally patent and obvious that Columbia Pictures intended to acquire, and that appellant intended to grant, full and complete rights to the production, creation, distribution, performance, exhibition and general exploitation of a *motion picture based upon appellant's original work.* Now, at the time when the contract was executed, in the year 1933, the only medium by which a motion picture could be commercially and profitably exhibited to an audience was by means of the motion picture theatre with the use of the screen upon which visualization was projected from the negative upon which it was photographed. The court will take judicial notice that at that time radio and

television were in an experimental state but were not used generally for the purpose of broadcasting or exhibiting to the public a *motion picture, or a motion picture version*. In fact, even to this day, the science of broadcasting by television what is actually seen upon a motion picture screen is still in an experimental stage. We indulged in a certain amount of conjecture in our opening brief, on page 21 thereof, as to why the parties included in paragraph 1, or paragraph 3, any reference to radio broadcasting or television. The drafter of this contract wanted to be certain that the producer would not be precluded from exhibiting the *motion picture* by any medium which at any time might become a proper or recognized method of exhibiting a picture—and it was for that reason that the contract contains these provisions.

We think it clear that wherever broadcasting rights or privileges pass under the contract, they are only incidental to the main purpose of the contract.

On pages 9 and 10 of appellees' brief, appellees point out that the radio script consisted of twenty-five pages and that the motion picture script consisted of 176 pages, and that the radio broadcast consumed one-half hour and, to use appellees' own language, "the motion picture scenario occupied the best part of two hours." Appellees then assert that by reason of these two factual elements alone, it is obvious that what was broadcast was not an entire play but in fact merely a sketch. In this connection, on page 3 of their brief, appellees make the following statement: "The mere difference in length of the radio broadcast and the motion picture scenario establishes conclusively that the former is but a small part of the latter . . ."

The fact that the radio performance lasted but one-half hour and the motion picture two hours, and that the radio script consisted of but twenty-five pages while the motion picture script consisted of 176 pages, is immaterial. The argument in this respect is superficial.

The *radio script* is written in close formation. The names of the characters delivering the dialogue appear upon the same lines with the actual words to be delivered. The radio script contains few, if any, directions to the actors, the director or the photographer—and there are of course no directions concerning scenic, prop or stage setting facilities, and few, if any, musical directions. The *motion picture* script is written in the loosest formation, with the dialogue literally spread in some points in the script over a space ranging from three to ten times the space consumed for the same dialogue in the radio script. The name of each character delivering each bit of dialogue in the motion picture script appears in bold, large type upon a separate line, following which the dialogue itself appears. This arrangement alone, when considered in the light of the fact that double spacing appears above and below the name of each character, consumes some fifteen to twenty per cent of the total space occupied by the motion picture transcript. The motion picture script is replete with directions for stage settings, props and stage scenery, and directions to the director and photographer and to the actors, as well as directions regarding incidental music. This phase of the motion picture script alone consumes a very substantial portion of the total number of pages in the entire script.

It is these differences in the form of the two papers upon which the scripts are written that cause the difference in the length of the scripts.

Conceivably, the literary construction of the two scripts might have been reversed, that is to say, the radio script might have been written in the loose formation and the motion picture script in the compact formation, and in that event it would have been the radio script and not the motion picture script which would have occupied the greater number of pages. We call the court's attention to that possibility only to illustrate the fallacy of appellees' argument—and if the forms had been reversed we feel quite certain that appellees would not so quickly have made the argument that the number of pages alone has any bearing upon whether the broadcast was a complete play or was merely a sketch.

Further, in this connection—but now with reference to the difference in the time consumed in the performance of the two adaptations—if this court will take the time to read both scripts, it will conclusively appear that, eliminating the directions contained in both scripts, it will take only slightly more time to read the motion picture script than it will to read the radio script.

We wish also to point out to the court that in the actual projection of the film upon the screen, in the exhibition of a motion picture, lengthy screen credits are thrown upon the screen prior to the actual exhibition of the picture itself. Much time, in the course of the showing of a motion picture, is devoted to the protrayal of artistic and beautiful photographic scenes and the introduction of elaborate, incidental music. These elements are all lacking, not only in radio broadcasting generally but the radio script here involved will show that such elements are particularly lacking in this radio broadcast.

For the foregoing reasons, it is here contended that appellees' argument that either the number of pages or

the number of minutes involved in either or both of the performances, both of which elements have been so emphatically stressed by appellees, throw absolutely no light whatsoever on whether the play that was broadcast was merely a sketch or a complete play.

We insist that the only proper method of determining this point is to read and examine both scripts carefully. Such an examination will show, as pointed out in appellant's opening brief, that the two exhibitions started with the same sequence, ended with the same sequence, and practilly all, if not all, of the intervening sequences are identical. The only difference between the two presentations was such as was made necessary by reason of the differences in the exhibition facilities of the two media.

It is for these reasons that in our opening brief we urged that there were in fact three versions, rather than just two, and we here repeat that in our opinion what was broadcast was not a sketch of a motion picture play, nor was it a broadcast of the motion picture version, but was in fact a broadcast of an entire play, to wit: the radio version of the original manuscript. The fact that the broadcast followed the motion picture version or was copied from the paper upon which the motion picture script was written no more classifies the broadcast as a broadcast of the motion picture version than it does the broadcast of the original dramatic version. All of the elements strictly belonging to the motion picture version were lacking in the version that was broadcast. The only thing that remained was the original story and the dialogue—and that obviously was lifted from the dramatic work itself. The mere intervening agency of a motion picture script does not provide an escape from this conclusion. Things equal to the same thing are equal to each other.

In our opening brief, we commented upon the effect of the general language of the contract as throwing light upon the intent of the parties. On page 9 of appellees' brief an effort is made to answer those arguments. In this connection, appellees state, "The best and simplest answer to this argument *is that if*, as we have argued heretofore, what was done by the appellees was to broadcast a sketch of the motion picture version, the appellant's warranty includes any loss, . . ." To use appellees' language, it *is* the simplest answer *if* what was done by appellees was permitted under the contract, but that is the principal question before this court and appellees here, as in other parts of their brief, have begged the question by assuming that their premise is correct and, accordingly, their conclusion must be correct. We insist that the premise is wrong and that therefore the conclusion is likewise wrong.

Appellees have not even attempted to answer certain of the arguments which have been presented to the court in appellant's opening brief. A reading of the two briefs will disclose the respects in which appellees have failed along those lines. We wish, however, to call the court's attention at this time to one point which, in our opinion, is a very important point, that is, that no explanation or reply appears in appellees' brief to that portion of appellant's argument, appearing on page 21 thereof, wherein appellant expressed his opinion as to the real reason for which paragraph 3 was included in the contract.

Appellant's Reply to Section in Appellees' Brief Entitled "The Trial Court Did Not Err in Denying Appellant the Right to Introduce as Evidence in the Case Plaintiff's Exhibit 1 for Identification."

We ask the court to read Plaintiff's Exhibit 1 for Identification. Such a reading will conclusively show the language used by appellee Columbia Pictures Corporation in its printed form of contract by which it intended to acquire full radio rights to a dramatic work. The fact that the record does not disclose whether such contract was not used before or after the time of the execution of the license agreement is immaterial. The simplest answer to appellees' argument is that at "one time or another" a contract, of which Exhibit 1 for Identification is a copy, was used by Columbia Pictures when it intended to acquire general broadcasting rights. It throws light upon the emphasis which Columbia Pictures itself intended to place upon the language used in the license agreement. It was proper evidence for the court to receive in interpreting the contract—and in refusing to permit the introduction of that document in evidence, the trial court committed prejudicial and reversible error.

It is respectfully submitted, therefore, that the judgment of the trial court should be reversed and, as requested in appellant's opening brief, judgment should be entered in favor of appellant for his costs, and this court should remand the cause to the trial court for the sole question of determining the issue of damages.

Respectfully submitted,

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J. ROBERT ARKUSH,
By J. ROBERT ARKUSH,
Attorneys for Appellant.

Dated: June 25, 1945.